

Floor Statement of Senator Tom Carper on the Nomination of Judge Samuel Alito

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Of the three branches of government, the Supreme Court seems the most removed from the American people. There are only nine members of the Court. None of them, in the end, is accountable to the public. They certainly don't have to face groups of angry voters at a town hall meeting or a local potluck dinner. And they're probably thankful for that.

However, their actions can have a tremendous and lasting effect on the lives of every American, probably more so than any senator or governor and, perhaps, more than many Presidents. For in the end, the Supreme Court exists as the last bastion of protection for the rights and freedoms of all Americans. That's why I take so seriously my obligation as a senator to provide advice and consent to our Presidents, as required by our Constitution, to determine whether their nominees truly merit a lifetime appointment to serve on our nation's highest court.

When I voted for John Roberts' nomination as Chief Justice last fall, I said it was a close call. Ultimately, though, I chose to take what I described then as a leap of faith. As someone whose political and legal opinions are somewhat more conservative than mine, I knew that Chief Justice Roberts would sometimes render decisions that I would not be comfortable or agree with. But after carefully reviewing his testimony, discussing that testimony with Democrat and Republican members of the Senate Judiciary Committee, meeting with him and other interested parties, and talking to colleagues who knew and worked with him, I concluded that John Roberts was a worthy successor to Chief Justice Rehnquist and was not likely to shift the balance of the Court in a significant way. When the time came to cast my vote, I had concluded that Justice Roberts' decisions would not be guided by ideology alone, but also by legal precedent and the combination of his life experiences as a judge, an attorney, an academic, a father and a husband. In short, by supporting John Roberts, I voted my hopes, not my fears.

After we confirmed Justice Roberts and turned to face yet another impending Supreme Court vacancy, I urged President Bush to send us a nominee similar to the person he or she would replace – Justice Sandra Day O'Connor. I noted that his next choice could divide this Congress and our country even further, or it could serve to bring us closer together.

In my view, we needed that type of consensus candidate to replace Justice O'Connor and her legacy on the Court. For more than 20 years, Justice O'Connor has been a voice of moderation during often difficult and tumultuous times. As we all know, her decisions oftentimes determined the direction of the court. Not infrequently, the opinions that she

wrote reflected the prevailing sentiment of our country and its citizens. In my view, she was the right Justice at the right time.

Unfortunately – and with some regret – I rise today unconvinced that Judge Samuel Alito is the right person to replace Justice O'Connor on the Supreme Court. And unlike a few months ago, when I rose to support the nomination of John Roberts, I will not be supporting Judge Alito's nomination to the Supreme Court.

In sharing that decision, though, let me be clear on several points. I will not be voting against his confirmation because I don't believe he has the legal qualifications and experience necessary to sit on the Supreme Court. I do. He is clearly very bright and demonstrates an excellent grasp of the law.

I will not be voting against him because I don't like or respect him. I do. He is described by a number of his colleagues as collegial, and hard-working and as a devoted father and husband. I believe that Sam Alito is an honorable person and that he has lived an honorable life.

Having said that, though, I don't believe we should vote for Supreme Court justices based solely on their qualifications and likeability. We must also consider their judgment, their legal opinions, their judicial philosophies, and what they said – or didn't say – during their confirmation hearings in order to determine whether we're truly comfortable with the direction a particular nominee will take our nation's highest court. After all, these are lifetime appointments that will have consequences for decades into our future.

In the end, I found myself asking one simple question, "Is Samuel Alito the right person for this vacancy, not just for now, but for decades to come?" For me, the answer to that question is, regrettably, no. Let me explain why.

As we all know, our Constitution provides for three separate, but equal, branches of the federal government – the legislative (Congress), the executive (the presidency and administration) and the judicial (the courts.) The framers of our Constitution believed that no branch of government was superior to another, so they established an intricate system of checks and balances to ensure that each branch kept a watchful eye on the other.

For instance, it's Congress' job to represent the people and write the laws of our land. But the President can refuse to sign a bill that Congress has passed if he or she disagrees with the outcome. Congress can then come back and over-ride the President's objections if it can muster the necessary votes. Meanwhile, the Supreme Court can rule that a law is – in part or whole -- unconstitutional, providing yet another important check on the power vested in Congress and the presidency. Admittedly, it's not the most harmonious or the quickest form of government, but it's served our country well over the last two hundred-plus years. Perhaps Churchill captured it best when he said that democracy is the worst form of government but for all the rest.

I'm concerned that, if confirmed, Judge Alito, during the decades he's likely to serve, will take the Court in a new direction that serves to undermine our systems of checks and balances, threatening the rights and freedoms that many of us hold dear.

Let me elaborate. In the past, Judge Alito has advocated for what's known as the "unitary executive theory." If you're like me, and you didn't go to law school, you're probably wondering what the heck that means. Let me put it simply. It means that Judge Alito believes that the President should largely be allowed to act without having to worry much about Congress or the Supreme Court stepping in and saying, "With all due respect, you're out of line."

This line of thinking greatly concerns me and, I believe, many of my colleagues and the people we represent. Remember, our nation declared her independence from Britain because we no longer wanted to be ruled by a king or by someone with king-like powers. Our Founders wanted power to be invested in the people and shared equally by the three branches of government.

To say, then, that there are times when a president's power should go largely unchecked except in very rare instances, in my opinion, goes against what our founders intended. Moreover, it(?) could lead to dangerous consequences, given how a particular president – either now or in the future – chooses to exercise that kind of unchecked power.

Let me give you a recent real-world example. Over the past few months, the Bush administration has been embroiled in several controversies over its policies concerning the torture of detainees, as well as its decision to spy on phone calls and emails apparently of thousands of people living in the United States who are suspected of being agents of foreign countries or entities. In both cases, the administration asserted that it should be able to act without the consent of Congress or the courts.

I disagree. I believe that our courts have an obligation under our laws to monitor an administration's actions concerning foreign prisoners and criminal suspects, and I believe administrations should have to justify, within reasonable periods of time, their decision to spy on Americans. I'll be the first to acknowledge that there are times when presidents need the ability to conduct secret wiretaps. Most of us agree on that point. The issue, however, is do presidents have a constitutional right to conduct secret wiretaps without court authorization, without another branch of government making sure that they don't break the law? The issue is checks and balances.

In these instances, Congress and the courts provide a needed and important backstop to make sure that the administration doesn't become overzealous and abuse the rights of innocent people.

Americans may not understand why these issues are such a big deal. They may even agree with the reasons the Bush administration, for instance, gave for circumventing the law.

But it's not a stretch to understand how a president – maybe not this one, but one in the future – could overstep his or her authority and thereby infringe on the civil rights of innocent Americans. For that reason alone, we should all have grave concerns about an unchecked presidency – or a Supreme Court justice who has routinely sided and ruled in favor of unchecked executive powers.

Jeffrey Stone, a law professor at the University of Chicago and a supporter of the Roberts nomination, said it best recently, when he noted, “Given the times in which we live, we need and deserve a Supreme Court willing to examine independently these extraordinary assertions of executive authority. We can fight and win the war on terrorism without inflicting upon ourselves and our posterity another regrettable episode like the Red Scare and the Japanese internment” of the 1950's and 1940's – two episodes in our history where our government seriously infringed on the rights of average Americans under the guise, and excuse, of national security.

But as Professor Stone went on to say, we'll only avoid such terrible excesses of governmental power “if the Justices of the Supreme Court are willing to fulfill their essential role in our constitutional system.”

Based on his history and his opinions, I fear that Judge Alito may well change the court's approach and rule in favor of expanded presidential power – not just at the expense of Congress and the courts, but ultimately at the expense of the American people. We cannot, nor should not, play witness to an unchecked presidency, regardless of political party. We need the courts – and Congress, too – to ensure that this administration and future administrations abide by the laws of this land and the principles we hold dear.

Just as I'm concerned about Judge Alito's views on expanded presidential power, I'm also concerned about Judge Alito's opinions on the role and powers of Congress.

Traditionally, Congress has enjoyed broad authority, as a co-equal branch of government, to debate and adopt laws to protect the interests of the American people, such as keeping our air and water clean and ensuring fair labor and employment standards across the United States.

Back in the 1990s, Congress used that authority to pass a bill that banned the possession or sale of machine guns among everyday Americans. To me, the ban wasn't about whether people had the right to own guns for recreation or self-protection. Those rights are forever enshrined in our Constitution. This was about whether people had the right to own Army-style machine guns – which, I think, reasonable people can agree have nothing to do with protecting our homes or going hunting.

Nevertheless, the constitutionality of the law was challenged in court. All nine federal appeals courts that heard the subsequent challenges upheld the validity of the original law.

Judge Alito, as a member of the federal appeals court that covers Delaware and our surrounding region, heard one of those challenges. He ended up disagreeing with his own court's decision and that of eight other federal appeals courts which ruled that Congress does indeed have the authority, under our Constitution, to ban the sale of machine guns across state lines.

My primary concern here is that if Judge Alito thinks that Congress shouldn't have the right to pass laws that arguably keep Americans safer, then what other laws might he believe Congress doesn't have the authority to adopt under the Commerce Clause of our Constitution? Laws that protect the air we breathe or the water we drink? Laws that allow men and women to take unpaid leave from their jobs to care for members of their families during times of crisis? I don't know, and that uncertainty is – for me at least – a cause of real concern.

A third broad concern that I hold about Judge Alito relates to his views on other rights and freedoms we enjoy as Americans, particularly a woman's right to end a pregnancy prior to fetal viability.

My own opinion about abortion is that we have far too many of them in this country and that we need to put a lot more effort into reducing the number of abortions that still take place. I'm sure on that point, Judge Alito and I agree.

But I'm not certain that Judge Alito agrees with me that we shouldn't go back in time to a place where almost all abortions were illegal, where women who wanted to end a pregnancy were forced into unhealthy behavior that often put their lives and their reproductive futures at risk. That's why, during his confirmation hearing, I was disappointed that Judge Alito, unlike Justice Roberts, declined to acknowledge that the Supreme Court decision that granted women the right to end an early-term pregnancy is "settled law."

Justice O'Connor, whom Judge Alito has been nominated to replace, has been the deciding vote on numerous cases that challenged this precedent. That's why I believe that replacing Justice O'Connor with Judge Alito – given his rulings and statements on this subject – we may well be putting this precedent in jeopardy.

Let me explain why. In the historic *Planned Parenthood v. Casey*, Judge Alito voted to uphold a Pennsylvania law requiring married women to notify husbands before obtaining an abortion even during the early stages of pregnancy. That case eventually went to the Supreme Court, which ruled against Judge Alito's position.

Justice O'Connor, who cast the deciding vote in overturning the Pennsylvania law and Judge Alito's position, wrote that women do not leave their constitutional protections at the altar. Married women are entitled to the same protections as single women. I believe she's right.

I had the opportunity to talk to Judge Alito at length recently. I asked him why he had ruled the way he did. He told me that he did not think the requirement placed an undue burden on married women. I asked him if he felt the same way today, especially in light of the Supreme Court ruling in opposition to his view. He told me he did. I respectfully disagree, and question what other undue burdens he may decide to place on women in the future.

Let me close by saying again that this is not an easy vote for me. As a former governor, I believe strongly that this administration or any other has the right to nominate judges of the same mind and philosophy. And I believe senators shouldn't automatically reject judges outright because of political affiliation or beliefs.

However, politicians of both stripes must take a stand and reject nominees that we believe will take the court too far to the extreme right or the extreme left. Wisely, Delaware's Constitution requires overall political balance in our state's courts. For every Democrat who's appointed to serve as a judge, Delaware governors have to nominate a Republican. The result has been an absence of political infighting and a balanced, exceptional, and highly regarded state judiciary.

Our federal Constitution, regrettably, doesn't require similar political balance when it comes to the judiciary, but political balance should be one of our goals. The founders of the U.S. Constitution tasked the Senate with finding that balance. I fear, in the end, that Judge Alito may well upset the balance that has existed on the Supreme Court for the better part of my lifetime and move the Court in a direction that will not be best for this country. So this time, unlike my vote for the nomination of John Roberts, I will be voting my fears, not my hopes.

Having said that, I wish Judge Alito well. I hope that if he's confirmed, and I believe he will be, that he proves my concerns wrong and unfounded. I hope he remembers that our Constitution -- that our entire democracy -- is both an everlasting -- and ever-changing -- experiment. Our Constitution is not something to be strictly interpreted, nor is it something to be recklessly abandoned.

Success in life is often measured not just by the stances that we take, but by the results we achieve. I believe that's one of the reasons why Justice O'Connor is so revered. It's not because she was always predictable or that she advocated an intractable world view. It's that she found the right balance, even in the most difficult, controversial and emotional cases of our times.

My fear is that, too often, Judge Alito may not do so, and thus I will not be supporting his nomination.

My hope, though, is that once he is confirmed to the Supreme Court, he will balance the scales of justice and not tip them too far in either direction.